93-450

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES ALBERT COONES,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 20, 1993

QUESTIONS PRESENTED

1. Considering 11 U.S.C. §552, does a security interest covering all crops of a debtor extend to crops planted after a bankruptcy petition is filed when the secured creditor provided no funds to the debtor for the post-petition crops?

[**Note:** Petitioner reserves the right to argue Question 2 in the event certiorari is granted on the above questions, but does not include Question 2 among the reasons for the grant of certiorari.]

2. Is a security interest as to crops enforceable in a Title 11 proceeding when the financing statement does not contain a legal description of the real property upon which the crops are grown, but instead only refers to another

financing statement not attached thereto, which does contain a legal description?

LIST OF PARTIES

The parties to the proceedings below are fully identified in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES ALBERT COONES,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner James Albert Coones respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of appeals for the Tenth Circuit, entered in the above-entitled proceeding on June 21, 1993.

OPINIONS BELOW

The opinion of the court of appeals for the Tenth Circuit is reported at 996

F.2d 250, and is reprinted in the appendix hereto, p. 1a, infra. The related decision of the Tenth Circuit, which was vacated by this Court, is reported at 954 F.2d 596, and is reprinted in the appendix hereto, P 8a, infra.

The memorandum decision of the United States District Court for the District of Wyoming has not been reported. It is reprinted in the appendix hereto, p. 29a, infra.

The order and memorandum decision of the United States Bankruptcy Court for the District of Wyoming have not been reported. They are reprinted in the appendix hereto, p. 68a, infra.

JURISDICTION

Jurisdiction for this matter is found under 28 U.S.C. §§158 and 1254(1). This

matter originated as Bankruptcy Case No. 88-05343-B in the United States Bankruptcy Court for the District of Wyoming.

The opinion of the United States court of appeals for the Tenth Circuit, which was entered on June 21, 1993, affirmed its prior decision in this matter (reported at 954 F.2d 596 and p. 8a, infra) in all respects relevant hereto despite this Court's remand. 113 S. Ct. 31 (1992)

STATUTES INVOLVED

11 U.S.C. §552 Post-Petition Effect of Security Interest.

(a) Except as provided in subsection (b) of this section, property acquired by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into

by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title [11 USCS §§363, 506(c), 522, 544, 545, 547 and 548], if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that

the court, after notice and a hearing and based on the equities of the case, orders otherwise.

STATEMENT OF THE CASE

The Petitioner, James A. Coones and his then wife Cindy L. Coones, filed their Petition for relief under Chapter 11 of the Bankruptcy Code on October 20, 1988 in order to reorganize the financial affairs of their farming and ranching operation.

On February 9, 1989 the Respondent filed its Motion to Prohibit Use of Cash Collateral based upon the security agreements executed by Petitioners on May 16, 1986. Respondent claims a security interest in all crops of the Petitioners; however, the documents that Respondent relies upon for perfection of its interest either contain no legal

description of the real property upon which the crops are grown, or include the following pre-printed language on the form: "Description of Real Estate if above collateral is crops, growing or to be grown, timber, mineral (including oil or gas) or fixtures". Following this phrase has been typed in "Recorded on Financing Statement Dated May 16, 1986." The Financing Statement(s) referred to in this security agreement was not attached to the recorded Agreement.

The 1988 wheat crop planting was not completed until after the filing of the Chapter 11 Petition. All other crops of the Petitioners were planted in the following spring. Neither Respondent nor its predecessor bank had advanced any funds for the planting of any crop of the Petitioners in 1988 or thereafter. (1986

was the last date any funds were received by the Petitioners from the bank subsequently taken over by the Respondent.) The means for purchasing fertilizer, seed, etc., came from other creditors or the Petitioners, themselves. No security agreement or other interest was renewed or granted to Respondent for the crops planted in 1988 and beyond.

The Bankruptcy Court denied the Respondent's Motion to Prohibit Use of Cash Collateral insofar as it related to the growing crops due to the absence of a proper legal description in the security agreements.

Both parties appealed the Bankruptcy Court's orders to the United States District Court for the District of Wyoming. Jurisdiction lies in the District Court by reason of 11 U.S.C.

§158(a). The Respondent's lien claim against Petitioners' pre-petition and post-petition crops was reinstated by the reversal of the Bankruptcy Court's ruling by the District Court. The District Court found that, even though the crops at issue were no longer in existence, the case was not moot. Further, the District Court reversed the Bankruptcy Court on the basis that a security agreement against crops can incorporate by reference a legal description contained in a separate and unattached document. The most important aspect of the decision was the determination that crops planted post-petition are "proceeds" as that term is used in 11 U.S.C. §552(b):

> The Appellees' argument that 11 U.S.C. Section 552 eliminates the lien on the post-petition crops does not take into account the fact that the Debtor used the proceeds from the FDIC's

> pre-petition crops to create the post-petition property. Consequently, under 11 U.S.C. Section 552(b), the post-petition crops are, for all intents and purposes, proceeds to which the FDIC security interest attaches.

Order on Appellants' Crops' Security Interest Appeal at 18 (see Appendix hereto at p. 61a, infra).

Appeals of this and other orders were taken to the United States court of appeals for the Tenth Circuit pursuant to 28 U.S.C. §158(d). The appeals were consolidated and thereafter affirmed by its Decision entered January 3, 1992. That Court found, inter alia, that crops planted post-petition were subject to a pre-petition security agreement because the crops "were produced with proceeds of debtors' pre-petition crops, proceeds in which the FDIC's security interest continued after initiation of bankruptcy

proceeding". (See Appendix hereto at p. 26a and 27a, infra.) (Please note that the factual determination as to the source of financing of post-petition crops first appeared in the District Court's Order on Appellants' Crops' Security Interest Appeal.)

The court of appeals further adopted the view that, to have a perfected security interest in crops, a creditor need not provide a legal description in the body of the instrument so long as reference is made to another instrument that contains the legal description.

This Court previously granted the Petition for Writ of Certiorari filed by Petitioner in this matter (113 S. Ct. 31 (1992)), and vacated the earlier judgment of the court of appeal with a remand to that Court "for further consideration in

light of Taylor v. Freeland & Kronz, 503 U.S._____ (1992)". Petitioner filed with this Court a "Motion for Clarification dated October 8, 1992, to clarify whether the entire judgment was vacated or only that portion of the judgment that related to Taylor. This motion was denied by this Court on November 2, 1992.

Upon remand, the court of appeals refused to reconsider the questions presented in this Petition " ...[b]ecause the Supreme Court's decision in Taylor addressed only the exemption issue." Coones, supra, 996 F.2d at 25.

REASONS FOR GRANTING THE WRIT

I.

The court of appeal's extension of pre-petition liens to post-petition assets (a) creates confusion and (b) conflicts with decisions of other Circuits.

By the decision reaffirmed in the instant case, the meaning of the term "proceeds" as used in 11 U.S.C. §552(b) has been impermissibly broadened into a vague and confusing standard that permits allow the extension of a pre-petition lien to assets acquired post-petition if there is even the possibility that the acquisition or creation of the post-petition asset was even made remotely possible by a pre-petition loan. From a practical standpoint, the court of appeals decision blurs the distinction between "after-acquired property" and "proceeds". The implication of the precedent set by the instant case is to allow the subsection (b) exceptions to the general rule promulgated by 11 U.S.C. §552(a) to subvert the intent of §552(a), and in effect make §552(b) the general rule.

Nor are the effects of this expansive reading of "proceeds" limited to crops. The logical result of allowing the broadening of the term "proceeds" as used is §552(b) permits the extension of a pre-petition lien to assets acquired post-petition if there is even the possibility that the acquisition or creation of the post-petition asset was even made remotely possible by a pre-petition loan. This "tracing" of the proceeds suggested by the judgment greatly expands the previously recognized procedure for tracing proceeds in the event of insolvency proceedings. (See U.C.C. 9-306(d).)

Reliance upon legislative history and other sources outside the Bankruptcy Code is misplaced if the statutory language is clear and plain on its face. Patterson v. Shumate, 119 L.Ed.2d 519, 526-27 (1992);

Toibb v. Radloff, 115 L.Ed.2d 145, 152 (1991) The court of appeals ignores this "plain meaning" method of statutory construction though its unwieldy method of tracing pre-petition proceeds to create or extend a security interest in crops planted by a debtor-in-possession after the petition was filed. Nowhere in the exceptions to the limitations of after-acquired property clauses listed in 11 U.S.C. §552(b) is there to be found any reference to crops. Section 552(b) clearly lists the exceptions which, interestingly, includes "offspring". Surely if the Bankruptcy Code drafters had intended post-petition crops to be included as an exception, it could just as easily have so provided as it did for the obvious agricultural inspired "offspring".

The court of appeal's liberal interpretation of the term "proceeds" appears to conflict with the rationale underlying the positions taken by other courts of appeals. See In re Bering Trader, Inc., 944 F.2d 500 (9th Cir. 1991); In re Jones, 908 F.2d 859 (11th Cir. 1990). (However, see In re Bumper Sales, Inc. 907 F.2d 1430 (4th Cir. 1990).) Indeed, insofar as the issue is narrowed to post-petition crops, the instant decision flies in the face of the overwhelming majority position as reflected by such cases as In re Smith, 119 B.R. 558 (S.D. Ohio, 1989); Bird v. Plains State Bank, 86 B.R. 660 (D. Kan. 1988); In re Wallman, 71 B.R. 125 (Bankr. D. S.D. 1987); In re Drewes, 68 B.R. 153 (Bankr. N.D. Iowa 1986); In re Lorenz, 57 B.R. 734 (Bankr. N.D. Ill. 1986); In re

Hamilton, 18 B.R. 868 (Bankr. D. Colo. 1982).

In expanding the reach of §552(b) proceeds exception, the court of appeals relies upon In re J. Catton Farms, Inc. v. First Nat'l. Bank, 779 F.2d 1242 (7th Cir. 1985), but that case did not deal with post-petition crops, but governmental contract payments (payment-in-kind proceeds) arising from a pre-petition contract. The court of appeals has taken a dangerous step in diluting the purpose of §552(a) by treating a security interest in a pre-petition contract in a similar fashion as a pre-petition security interest in crops.

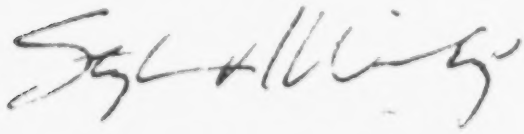
Without some clarification concerning the reach of the proceeds exception to §552(a), a "Pandora's box" is opened whereby pre-petition secured creditors, no

matter how distant from the planting of the contested crops, can now apparently claim a lien against post-petition crops through an alleged tracing of proceeds or indirect benefits therefrom. Plenary consideration of the matter by this Court is essential.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,



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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, Debtors.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of STOCKMEN'S BANK AND TRUST COMPANY, and liquidator of FIRST NATIONAL BANK OF SHERIDAN, Appellee,	)	Nos. 90-8113 & 90-8114
v.	)	
JAMES ALBERT COONES; CINDY LEE COONES, f/k/a Cindy Lee Jones, Appellants.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF WYOMING
(D.C. Nos. C89-0242-K and 89-243-K)

Submitted on the briefs:

Jeanne R. Lee, Counsel, and Timothy C. Kingston, Federal Deposit Insurance Corporation, Denver, Colorado, and Ann S. DuRoss, Assistant General Counsel; Richard J. Osterman, Jr., Senior Counsel, Edward J. O'Meara, Counsel, Federal Deposit Insurance Corporation, Washington, D.C., for Appellee.

Stephen R. Winship of Donald R. Winship & Associates, Casper, Wyoming, for Appellants.

Before LOGAN, MOORE, and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

These appeals are before this court following the Supreme Court's order vacating our previous decision, FDIC v. Coones (In re Coones), 954 F.2d 596 (10th Cir.), vacated, 113 S. Ct. 31 (1992), and remanding for reconsideration in light of Taylor v. Freeland & Kronz, 112 S. Ct.

1644 (1992).[1] Our prior decision resolved two issues: 1) whether debtors were entitled to exempt certain property from their bankruptcy estate; and 2) whether the FDIC held a valid security interest in debtors' crops. See Coones, 954 F.2d at 598, 599. Because the Supreme Court's decision in Taylor addressed only the exemption issue, see 112 S. Ct. at 1646, we will not reconsider the validity of the FDIC's security interest; nothing in Taylor leads us to believe that we incorrectly resolved that issue in our prior opinion. See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.,

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

981 F.2d 1177, 1178 (10th Cir. 1993), petition for cert. filed, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784).

Debtors James Albert and Cindy Lee Coones, Wyoming ranchers, commenced Chapter 11 bankruptcy proceedings in October 1988, claiming as exempt property seventy-five percent of their livestock acquired and crops grown after 1986. Despite the fact that no party filed a timely objection, the bankruptcy court denied this exemption, determining that there was no legal basis under Wyoming law to support it. Debtors appealed. Both the district court and this court affirmed the denial of that exemption. As noted, the Supreme Court has not vacated that determination.

In the time since debtors initiated their appeal from the denial of this exemption, the bankruptcy court has

dismissed debtors' Chapter 11 proceedings, after denying their motion to convert their bankruptcy to Chapter 12. Those bankruptcy court decisions are currently pending on appeal before the district court. See Appellants' Supp. Br. at 2; Appellee's Supp. Br. at 4 n.1. Ms. Coones subsequently obtained the discharge of her debts under Chapter 7. Debtors were also divorced.

In light of these subsequent events, we ordered Ms. Coones, following the Supreme Court's remand, to show cause why her appeal of the exemption issue remains justiciable. Ms. Coones did not specifically respond to our show cause order. The supplemental brief purportedly filed on behalf of both debtors following remand did, however, address the continuing justiciability of Ms. Coones; exemption claim and attached a copy of the

divorce decree, which we read as giving to Mr. Coones all the interest in any property currently at issue in these appeals. See Appellants' Supp. Br., ex. 5, Stipulation and Agreement at 2-3; see also Appellants; Supp. Br. at 4. We therefore treat Mr. Coones as possessing any property interest at issue here.

The primary issue presented by this remand, therefore, is whether the Supreme Court's decision in Taylor requires a reversal of our conclusion that the bankruptcy court did not err in denying debtors' exemption, despite the lack of a timely objection, because the exemption lacked a legal basis in state law. The FDIC concedes that Taylor does require a reversal on the exemption issue.[2]

[2] The FDIC, on remand, does not argue that the bankruptcy court had inherent authority, under 11 U.S.C. § 105(a), to deny the exemption, despite the lack of a timely filed objection, because the exemption lacked a legal basis. See

Appellee's Supp. Br. at 4. Accordingly, we REVERSE the district court's decision affirming the bankruptcy court's denial of the exemption and REMAND to the district court for further proceedings consistent with this opinion.

Taylor, 112 S. Ct. at 1649 (noting but delining to address this issue). We therefore do not reach that issue.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, Debtors.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of STOCKMEN'S BANK AND TRUST COMPANY, and liquidator of FIRST NATIONAL BANK OF SHERIDAN, Appellee,	)	
v.	)	No. 90-8113 & 90-8114
JAMES ALBERT COONES; CINDY LEE COONES, f/k/a Cindy Lee Jones, Appellants.	)	

Appeals from the United States District Court for the District of Wyoming
(D.C. Nos. C89-0242-K & 89-243-K)

Submitted on the briefs:

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Before LOGAN, MOORE and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

In these two appeals from Chapter 11 bankruptcy proceedings, debtors appeal district court decisions (1) determining that the appellee Federal Deposit Insurance Corporation (FDIC) possessed an enforceable security interest in debtors' crops (appeal No. 90-8113); and (2) denying debtors' motion, made pursuant to 11 U.S.C. § 522(f), to avoid the FDIC's liens in debtors' post-1986 crops and livestock (appeal No. 90-8114). This

court will review the bankruptcy court's factual findings under a clearly erroneous standard, but we will review the district court's legal determinations de novo. Dalton Dev. Project #1 v. Unsecured Creditors Comm. (In re Unioil), No. 90-1111, slip op. at 6 (10th Cir. Nov. 4, 1991). Upon careful consideration of debtors' arguments on appeal, we affirm.[1]

In 1986, debtors and Stockmen's Bank & Trust Company (Stockmen's) entered into two loan transactions. Along with two promissory notes, debtors executed security agreements which gave Stockmen's a secured interest in, among other things,

> "FARM PRODUCTS: All farm products of the [debtors], whether now owned or

[1] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

> hereafter acquired including but not limited to (i) all poultry and livestock and their young, products thereof and produce thereof, (ii) all crops, whether annual or perennial, and the products thereof. .

In addition to any property generally described above, the following Collateral:

> ALL INVENTORY OF CATTLE, HORSES, AND ALL OTHER LIVESTOCK, ALL FARM PRODUCTS OF CATTLE, HORSES, AND ALL FARM EQUIPMENT AND MACHINERY, OTHER EQUIPMENT AND MACHINERY, INVENTORY, FARM PRODUCTS, HAY, GRAIN, CROPS, CROP INVENTORY AND CROP FARM PRODUCTS, VEHICLES, ACCOUNTS, CONTRACT RIGHTS, OR GENERAL INTANGIBLES ARISING FROM THE SALE OR DISPOSITION OF PRODUCTS THEREOF NOW OWNED OR HEREAFTER ACQUIRED AND WHEREVER LOCATED."

Appellee's Supp. App. at 231; see also id. at 239.

In October 1988, debtors jointly filed for Chapter 11 bankruptcy relief. On their bankruptcy schedules, debtors listed as exempt property, see generally 11 U.S.C. § 522, inter alia, seventy-five percent of their livestock acquired and their crops grown after 1986. Debtors

asserted this property was exempt as personal service earnings under Wyoming law. No timely objection to the exemption was filed by any interested party.

In February, 1989, the FDIC filed a motion to prohibit debtors' use of cash collateral. See generally 11 U.S. C. § 363(e). Later in February 1989, debtors filed an application to avoid the FDIC's liens impairing the claimed exempt property.

Following a hearing, the bankruptcy court denied debtors' claimed exemptions, despite the lack of a timely objection, ruling the exemptions had no valid state law basis. See Appellants' App., doc. 1, 9-10. In a subsequent order dated June 26, 1989, the bankruptcy court denied the FDIC's motion to prohibit use of cash collateral, but only as to the FDIC's interest in debtors' crops, ruling that

the FDIC did not have an enforceable security interest in debtors' crops. See Appellants' App., doc. 2, 4-7. The bankruptcy court granted the FDIC's motion to prohibit use of cash collateral insofar as it pertained to "cash collateral which is not the proceeds of the debtors' crops." Appellee's Supp. App. at 184-85.

The parties filed cross-appeals from the bankruptcy court determinations. The district court certified the question of the validity of debtors' claimed exemptions under Wyoming law to the Wyoming Supreme Court. See Appellee's Supp. App., 1-4. The Wyoming Supreme Court determined debtors' personal service earnings exemption had no valid basis under Wyoming state law. Coones v. FDIC, 796 P.2d 803, 806 (Wyo. 1990).

The district court then determined that, in light of the Wyoming Supreme

Court decision, debtors were not entitled to the personal service earnings exemption, even though the FDIC had failed to object to that exemption in a timely manner. Coones v. FDIC, No. C-89-243-K, Order on Appellants' Exemption Appeal (D. Wyo. Dec. 5, 1990). In another order also dated December 5, 1990, the district court reversed the bankruptcy court determination that the FDIC did not have an enforceable security interest in debtors' crops. Coones v. FDIC, No. C89-242-K, Order on Appellant's Crops' Security Interest Appeal (D. Wyo. Dec. 5, 1990). Debtors appeal from both of these district court determinations.

I

The first issue presented is whether the lack of a timely objection to debtors' claimed exemption precluded the bankruptcy court from denying that exemption, even

though the exemption has no valid state law basis.[2] Section 522, however, contains an implicit requirement that the claimed exemption have a valid statutory basis. See, e.g., Sherk v. Texas Bankers Life & Loan Ins. Co. (In re Sherk), 918 F.2d 1170, 1174-75 (5th Cir. 1990). The lack of a timely objection will not preclude the bankruptcy court's exercise of its authority to deny an exemption that has no legal basis. See, e.g., id. But see Taylor v. Freeland & Kronz, 938 F.2d 420, 423 (3 d Cir.), cert. granted, 112 S.

[2] Bankruptcy Rule 4003(b) requires that any trustee or creditor may file an objection to a claimed exemption within thirty days after the conclusion of the meeting of creditors or the filing of any amendment to the listed exemptions. Rule 4003(b) further provides that the bankruptcy court may only extend the time to file a objection if the extension is requested with the original time for filing the objection. See also Clark v. Brayshaw (In re Brayshaw), 912 F.2d 1255, 1256-57 (10th Cir. 1990). The parties do not dispute the lack of a timely filed objection.

Ct. 632 (Nov. 27, 1991) (lack of timely objection precludes bankruptcy court's exercise of its authority to deny an exemption).

Debtors argue that this court should adopt the Sixth Circuit's conclusion in Munoz v. Dembs (In re Dembs), 757 F.2d 777 (6th Cir. 1985), that failure to object to a claimed exemption that has a good faith basis in state law will conclusively establish the debtor's exemption. See id. at 780; see also Halverson v. Peterson (In re Peterson), 920 F.2d 1389, 1392-94 (8th Cir. 1990) (debtor can overcome late objection only if exemption appeared in good faith to have been valid). Even under Dembs' good faith analysis, debtors' argument fails because their claimed exemption lacked a good faith basis under Wyoming law.

In claiming their exemption, debtors relied upon the Wyoming Supreme Court decision in Lingle State Bank v. Podolak, 740 P.2d 392 (Wyo. 1987). Podolak, however, addressed a prior state statute that did not apply to debtors' claims, see Coones, 796 P.2d at 804-05, and which has been rewritten so that a "present comparison is . . . impracticable," Podolak, 740 P.2d at 394 n.1. Recognizing this, the Podolak court acknowledged that its decision "is consequently circumscribed in future application." Id. Therefore, debtors' claimed exemption, based upon the Wyoming Supreme Court's decision in Podolak, did not have a good faith basis in Wyoming law.

II

Debtors next argue that the FDIC did not have an enforceable security interest in debtors' crops because the security

agreements failed to include a description of the property on which the crops were grown. Wyoming law controls the determination of the validity of the liens. See In re Martin Grinding & Mach Works, Inc., 793 F2d 592, 594 (7th Cir. 1986).

To create an enforceable security interest, Wyoming law requires, inter alia, a security agreement, signed by the debtor, which contains a description of the collateral. Wyo. Stat. § 34.1-9-203(a)(i). If the collateral includes crops, growing or to be grown, the security agreement must also include a description of the land concerned. Id.; see also Citizens Nat'l Bank & Trust Co. v. Serelson (In re Burkart Farm & Livestock), 938 F.2d 1114, 1115 (10th cir. 1991).

The security agreements in the instant case did not include a description of the land upon which debtors' crops were growing or were to be grown. Rather, in the section on the security agreements designated as "Description of real Estate if above Collateral is crops, growing or to be grown," the security agreements included the language "RECORDED ON FINANCING STATEMENT DATED MAY 16, 1986." Appellee's Supp. App., 231; see also id. at 239. Thus, the security agreements did specifically refer to the description of land included in the financing statements filed by Stockmen's to perfect its liens in these crops.

Debtors argue, however, that the land description must be included in the security agreement and, therefore, reference to the financing statements cannot provide the necessary land

description. We disagree. A security agreement need not be evidenced by a single document, but may be established through consideration of two or more written documents. Looney v. Nuss (In re Miller), 545 F2d 916, 918, n.4 (5th Cir.) (applying Texas law), cert. denied, 430 U.S. 987 (1977); see also, e.g., Royal Bank & Trust Co. v. Pereira (In re Lady Madonna Indus., Inc.), 99 B.R. 536, 542 (S.D.N.Y. 1989) (composite document theory of security agreements permits finding security agreement through various loan documents) (dicta), and cases cited therein. It is appropriate to refer to other documents to establish the security interest unless the security agreement is facially complete and does not refer to any other documents. See In re Lady Madonna Indus., 99 B.R. at 542.

The security agreements at issue in these appeals clearly incorporated the land description included in the financing statements. Reference to the financing statements to establish the FDIC's security interests, therefore, was not erroneous. See Longtree, Ltd. v. Resource Control Int'l, Inc., 755 P.2d 195, 203-04 (Wyo. 1988) (subsequent, unsigned document describing additional collateral may be considered in establishing security interest created by original security agreement, if documents express some internal connection with one another); cf. Maxl Sales Co. v. Critiques, Inc., 796 F2d 1293, 1298 (10th Cir. 1986) (applying Kansas law) (security agreement incorporated by reference consignment agreement); Pontchartrain State Bank v. Poulson, 684 F2d 704, 707 (10th Cir. 1982) (applying Oklahoma law) (documents,

considered separately or taken as a whole, did not satisfy requirements of Oklahoma U.C.C. § 9-203).

The authorities debtors cite for the proposition that a security agreement may not be expanded by reference to the financing statement are inapposite. Those cases addressed situations where the creditor attempted to correct a deficiency in the security agreement's description of collateral by referring to the financing statement, even thought the security agreement did not specifically incorporate the description of the collateral in the financing statement by reference. See, e.g., Mitchell v. Shepherd Mall State Bank, 458 F.2d 700, 702-04 (10th Cir. 1972) (applying Oklahoma law); In re Martin Grinding, 793 F.2d at 594-95 (applying Illinois law).

Debtors next argue that the FDIC's security interest in debtors' crops is not enforceable because the security agreements' description of the land, incorporated from the financing statements, was insufficient. "[A]ny description of . . .real estate is sufficient whether or not it is specific if it reasonably identifies what is described." Wyo. Stat. § 34.1-9-110.

> "The test of sufficiency of a description laid down by this section is that the description do the job assigned to it - That it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings . that the descriptions are insufficient unless they are of the most exact and detailed nature . . . ."

Wyo. Stat. § 34.1-9-110 Official Comment.

The financing statements described the land by range, township and section. See Appellee's Supp. App., 245, 246. Although a legal description of the land

is not required, cf. In re McMannis, 39 B.R. 98, 100 (Bankr. D. Kan. 1983) (applying Kansas U.C.C. § 9-110), the Wyoming Supreme Court, in addressing a similar issue, noted that "[t]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Landen v. Production Credit Ass'n, 737 P.2d 1325, 1329 (Wyo. 1987) (quoting United States v. Collingwood Grain, Inc., 792 F.2d 972, 975 (10th Cir. 1986) (quoting Kansas Comment to Kan. Stat. Ann. § 84-9-402)).

Debtors, however, assert that the legal description in the financing statements is in error because, in addition to describing debtors' property, the legal description includes land belonging to adjoining land owners. Failure to specify the particular pieces of a section on which the crops are

growing or will be grown, however, will not destroy an otherwise sufficient land description. Cf. Collingwood, 792 F.2d at 974-75 (land description indicating crops growing on 160-acre tract in a particular section, but not precisely indicating location of 160-acre tract within that section, was sufficient description of land). The land descriptions contained in the financing statements are sufficient to identify debtors' property upon which the crops were grown.

III

Finally, debtors argue that, in any event, the FDIC's secured interest in post-petition crops was extinguished by the bankruptcy filing. Debtors rely upon 11 U.S.C. § 552 (a), which provides that "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the

commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." Subsection (b), however, with exceptions not relevant here, provides that

> "if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, . . .then such security interest extends to such proceeds, . . .acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

11 U.S.C. § 552 (b).

The district court correctly determined that, because the post-petition crops were produced with the proceeds of debtors' pre-petition crops, proceeds in which the FDIC's security interest

continued after initiation of bankruptcy proceedings, § 552 did not extinguish the FDIC's secured interest in the post-petition crops. See J. Catton Farms, Inc. v. First Nat'l Bank, 779 F.2d 1242, 1244, 1246-47 (7th Cir. 1985) (applying § 552 (b) to use of proceeds of pre-petition crop collateral, including government payments not to grow crops, to produce post-petition crops) (dicta).

> "[W]hen a secured party has a pre-petition security interest in a crop in Year 1, its security interest extends to the post-petition proceeds of that crop as well as to the post-petition crop in Year 2 and its proceeds if the Year 2 crop is financed with the proceeds of the Year 1 crop."

Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.), 907 F.2d 1430, 1439 (4th Cir. 1990) (dicta).

Debtors argue that "[t]here is no evidence in the appeal record that any proceeds were . . .used . . .'to create

the post-petition crops.'. . . For the District Court to rely on such a position, it should have remanded the matter for further findings." Appellants' Reply Br. at 9. In support of this argument, however, debtors assert only that "as a practical matter it is rather doubtful that monies advanced in May, 1986 were used to create a winter wheat crop planted in late 1988." That allegation is not sufficient to compel this court to reverse the district court's determination.

The parties' remaining arguments lack merit. The judgments of the United States District Court for the District of Wyoming are, therefore, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of the Stockmen's Bank and Trust Company and as Liquidator for the First National Bank of Sheridan, Wyoming,	)	
Appellant/Creditor,	)	
v.	)	No. C89-242-K
JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones,	)	
Appellees/Debtors.	)	

ORDER ON APPELLANT'S CROPS' SECURITY INTEREST APPEAL

This matter came before the Court on Appellant/Creditor's appeal from an order entered by the United States Bankruptcy Court for the District of Wyoming in a case entitled In re: James Albert Coones and Cindy Lee Coones, Case No. 88-05343-B. Timely Notice of Appeal was filed on July 6, 1989 from the final Order of the Bankruptcy Court. The issue as presented

by the Appellant is whether the Bankruptcy Court erred in its decision that the FDIC does not have a perfected security interest in the Debtors' crops.

DISCUSSION

The Bankruptcy Court in its June 26, 1989 "Order Denying In Part and Granting In Part the FDIC's Motion to Prohibit Use of Cash Collateral" denied the FDIC's request to prohibit the use of cash collateral only insofar as the request pertained to proceeds of the Debtors' crops. The Court stated, in its decision accompanying the Order, that:

> "In this case, the Security Agreements, which are the documents which would create the security interest, do not contain an adequate description of the land covered in connection with crops as required by Section 34-21-922."

The Debtors owe the Appellant, FDIC, as Liquidator for the First National Bank of Sheridan, Wyoming and as Receiver for

Stockmen's Bank and Trust Company of Gillette, Wyoming, a debt in excess of $700,000.00 secured by collateral the value of which is approximately $450,000.00.

The FDIC, as the Receiver of Stockmens Bank and Trust Company is the holder of two notes from the Debtors set forth in documents entitled "Promissory Note and Security Agreement". Both Notes were executed on May 16, 1986 and have the principal amounts of $400,000.00 and $70,017.00. (The FDIC, as Liquidator of the First National Bank of Sheridan, is also the holder of two (2) notes from the Debtors in the approximate amount of $45,000.00 and $50,000.00 secured by real estate plus oil and gas equipment, but these notes and security interests have never been disputed.) The Stockmen's Notes and accompanying

commercial paper, as presented by the Appellant, are outlined as follows:

$400,000.00 NOTE-"BUSINESS; RENEWAL AND PURCHASE"

Promissory Note and Security Agreement (Appellant's Exhibit A)

Financing Statement, Campbell County Clerk Real Estate Records, "All Farm Products. . ." with legal description (Appellant's Exhibit B)

Financing Statement, Campbell County Clerk, "All Farm Products . . ." (Appellant's Exhibit C)

Financing Statement, Secretary of State, "All Farm Products. . ." with legal description (Appellant's Exhibit D)

Financing Statement, Campbell County Clerk, "All Inventory of Cattle. . ." (Appellant's Exhibit E)

Financing Statement, Secretary of State, "All Inventory of Cattle. . ." (Appellant's Exhibit F)

Certificate of Title, 1st and 2nd Liens, typical of all vehicles (Appellant's Exhibit N)

$70,017.00 NOTE-"BUSINESS; OPERATING"

Promissory Note and Security Agreement, (Appellant's Exhibit G)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Farm Products. . ." with legal description (Appellant's Exhibit H)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Farm Products. . ." (Appellant's Exhibit I)

Financing Statement, 2nd Lien, Secretary of State, "All Farm Products. . ." with legal description (Appellant's Exhibit J)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Inventory of Cattle ..." (Appellant's Exhibit K)

Financing Statement, 2nd Lien, Secretary of State, "All Inventory of Cattle..." (Appellant's Exhibit L)

Security Agreement, additional to Exhibit G Above, (Appellant's Exhibit M)

Certificate of Title, 1st and 2nd Liens, typical of all vehicles (Appellant's Exhibit N)

There is no dispute as to the existence or the authenticity of the two Promissory Notes, their integral Security Agreements and their related Financing Statements. These documents are a matter

of the public record. All of the documents were executed by the Debtors and were filed with the appropriate recording office as is designated on the exhibits in accordance with Wyoming Statutes.

The Debtors gave Stockmen's Bank and Trust two documents, each entitled "Promissory Note and Security Agreement". Each of these Promissory Notes granted the Bank two separate and distinct security interests; (1) the $400,000.00 Note is secured by a real estate Mortgage (a second Mortgage on the property possibly having no remaining equity) and a Security Agreement and (2) the $70,017.00 Note having two separate Security Agreements, one contained within the body of the "Promissory Note and Security Agreement" and the other being a separate document altogether. The security agreement contained within the body of the

"Promissory Note and Security Agreement" relates to the crops and describes the real estate by reference to a Financing Statement of a date even therewith, notwithstanding the fact that the Financing Statement served a dual role as the document describing the property for the purpose of the Security Agreement plus its statutory role as a Financing Statement. The property upon which the crops were located is described, subscribed and acknowledged by the Debtors. The Security Agreements therefore are enforceable and attached to the collateral.

The Appellees request that this Court review the record to determine whether or not a security agreement exists between the Debtors and the FDIC. As relied upon by the Bankruptcy Court before, this argument centers around Landen v. PCA of

Midlands, 737 P.2d 1325 (Wyo. 1987) and the Wyoming Uniform Commercial Code; specifically Article 9, Secured Transactions, WSA Sections 34.1-9-101, et seq.

The uncontroverted evidence below shows that there were two documents entitled "Promissory Note and Security Agreement", given by the Debtors to the Stockmen's Bank and Trust Company of Gillette, one in the amount of $400,000.00 and one in the amount of $70,017.00, (Appellant's Appendix Exhibits "A" and "G"). A careful review of both these documents reveals that each Promissory Note is secured by the Security Agreement appearing on the face of the Promissory Note. The $70,017.00 Note, in addition, has a separate Security Agreement given for the Promissory Note (Appellant's Appendix Exhibit "M"). Therefore, the two

obligations to pay the Bank are each secured by two separate and distinct security interests; one being contained within the body of the Promissory Note and the other being a separate document (a second Mortgage with the $400,000.00 note and a separate Security Agreement on the $70,017.00 note). This discussion focuses on the Security Agreements between the Debtors and the Bank contained within the body of each "Promissory Note and Security Agreement" as the issue addressed by the Bankruptcy Court is contained within these Security Agreements; that issue being whether or not there is a security interest granted the Bank by the Debtors in the Debtors' crops.

A review of each of the Promissory Notes shows that the Debtors, James A. Coones and Cindy L. Coones, both executed the Agreements which, on their face,

granted the Bank a security interest in, among other things, the Debtors' "crops, crop inventory, and crop farm products" (Appellant's Appendix Exhibit "A" and Exhibit "G"). At the bottom right-hand corner of each of the "Promissory Note and Security Agreements" is a box in which the description of the real estate on which the crops are grown is to be inserted. The land is described as "Recorded on Financing Statement Dated May 16, 1986". These Financing Statements (Appellant's Appendix Exhibits "B", "D", "H", and "J"), filed with the "Campbell County Clerk, Real Estate Records" and the Wyoming Secretary of State, clearly show the legal description of the property upon which the crops are grown.

The Appellant's position is that the security interest attached to the crops pursuant to the "Promissory Note and

Security Agreements" in that the description of the real estate was incorporated into the Security Agreement on its face by reference to the Financing Statement. Although the documents entitled "Promissory Note and Security Agreement" and the Financing Statements are two separate documents, it is clear from the record that the intent of the parties was to describe the real estate by reference to the Financing Statement notwithstanding the separate legal purpose of the Financing Statement. These Financing Statements were also executed by the Debtors and describe the Debtors' property upon which the crops were grown. The Debtors have never disputed this. Therefore, each "Promissory Note and Security Agreement", on its face, coupled with its reference to the legal description of the real property upon

which the crops were grown in the Financing Statement, constitutes the entire Security Agreement granting the security interest in the Debtor's crops. Although the Financing Statement does serve a separate legal purpose in secured transactions, it is clear that the Financing Statement is incorporated into the Security Agreement for the purposes of describing the real estate upon which the crops were grown.

> "The security agreement is the contract between the parties;..." Landen v. Production Credit Association, supra, at 1325, quoting American Restaurant Supply Company v. Wilson, Fla. App., 371 So.2d 489, 490 (1979) (emphasis in original)

The Wyoming Uniform Commercial Code provides:

> "In this article unless the context otherwise requires:
>
> **********
>
> "(xii) "Security Agreement means an agreement which creates or provides for a security interest;"***

Section 34-21-905 (a)(xii), W.S. 1977

> [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> (i) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;..."

Section 34-21-922 (a)(i), W.S. 1977 (1988 Cumm. Supp.) (emphasis added).

> "For the purposes of this article, any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

Section 34-21-910, W.S. 1977.

Regarding the Wyoming Uniform Commercial Code, the record shows that (1) there are two Security Agreements covering the crops between the Debtors and the Bank spelled out specifically on the face of each "Promissory Note and Security

Agreement", and (2) the security interest is enforceable and has attached in that each of these Security Agreements have been signed by the Debtors, they contain a description of the collateral and, finally, they contain an acknowledged and subscribed description of the land which is incorporated into the Security Agreements by reference to the Financing Statements. The description of the land concerned, in accordance with W.S.A. § 34-21-910, is sufficient because it reasonably identifies what is described.

"It has also been said that:

> "[T]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Id. at 975, quoting Kansas Comment to Kan. Stat. Ann. Section 84-9-402, which discusses Chanute Production Credit Association v. Weir Grain & Supply, Inc., 210 Kan. 181, 499 P.2d 517 (1972)."
> Landen v. Production Credit Association, supra, at 1329.

The description of the real estate as set forth in the Financing Statements referenced in the Security Agreements is accurate as far as the record shows. It is based on information acknowledged and subscribed to by the Debtors. It must be assumed for the sake of this case that the legal description in the Financing Statements referred to by the Security Agreements is, for all intents and purposes, correct.

The contents of the Security Agreements at issue in this case are contained not only on the face of each of the "Promissory Note and Security Agreement" but in the legal description of the lands involved contained in the Financing Statement which is incorporated by reference in the Security Agreement. It has been stated that, if there is more than one writing and all of the writings

are signed by the party to be charged (in this case, the Debtors) and it is clear by their contents that they relate to the same transaction, there are no problems present in interpreting the intent of the parties as set forth in their agreement. See Foreman v. Gadouas, 247 Mass. 207, 142 N.E. 87 (1924); Jennings v. Ruidoso Racing Ass'n, 79 N.M. 144, 441 P.2d 42 (1968).

As a general proposition,

> "incorporation by reference is generally effective to accomplish its intended purpose where... the provision to which reference is made has a reasonably clear and ascertainable meaning." J.S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 215 (5th Cir. 1973).

Thus, documents that are effectively incorporated by reference into an agreement become as much a part of the contract between the parties as the document they sign. Turner Constr. Co. v. Midwest Curtainwalls, Inc., 187 Ill. App

3d 417, 135 Ill Dec. 14, 543 NE2d 249 (1989); Teign Constr., Inc., v. Pavement Specialists, Inc., 267 NW2d 574 (SD 1978); Kilbourne-Park Corp. v. Buckingham, 404 P.2d 244 (Wyo 1965); Harper v. Home Idem. Co., 140 So 2d 653 (La App 1962); Johnston Bros., Inc., v. Village of Coopersvile, 261 Mich 26, 246 NW 551 (1932); 17A C.J.S., Contracts Section 299.

No specific language is necessary to incorporate an extraneous document by reference. See First Nat'l Bank Lexington, Tenn. v. United States, 12 Cl. Ct. 719 (1987), rev'd on other grounds, 846 F.2d 740 (Fed. Cir. 1988), cert denied, 109 S.Ct. 231, 102 L Ed 2d 221 (1988); United Cal. Bank v. Prudential Ins. Co. of Am., 140 Ariz 238, 681 P.2d 390 (1983); Burns v. Ford Motor Co., 29 Ill App 3d 585, 331 NE2d 325 (1975).

Nor is it necessary to attach the incorporated documents to the agreement. See United Cal. Bank v. Prudential Ins. Co. of Am., 140 Ariz 238, 681 P.2d 390 (1983).

All referenced documents must be in existence and must be reasonably described. See Chiacchia v. National Westminster Bank USA, 124 AD2d 626, 507 NYS2d 888 (1986); Skouras v. Dmiralty Enterprises, Inc., 386 A2d 674 (Del 1978).

It is clear from the record and the great weight of authority cited above that there was a security interest granted the Bank by the Debtors and that it attached to the Debtors' collateral. The statutory formalities were followed. The Debtors executed the Security Agreements and referenced Financing Statements which included the description of the real estate. The Financing Statement is an

integral part of the Security Agreement by its incorporation on the face of the Security Agreement. The Financing Statement is in existence and was executed by the Debtors. The Financing Statement serves as the legal description of the crops' property in addition to it separate function as a "Financing Statement" under the Wyoming Statutes. Incorporation of the Financing Statements into the Security Agreements by reference is completely allowable and, in this particular case, appropriate in that the legal description of the real estate could not have been included in the Security Agreements on their face due to the physical lack of space. A separate document, whether it be the Financing Statement or exhibit, would necessarily have to have been incorporated by reference into the Security Agreement and the parties, intended the Financing

Statement to serve as the legal description of the property where the crops would be grown.

"Perfection" of a security interest is directly at issue in this case. The Bankruptcy Court had relied on Landen v. PCA of Midlands, supra, in support of its decision concerning the Debtors' crops. The Landen Court addressed the issue of the over-inclusion of property in a description in a Security Agreement and Financing Statement, and the Debtors initially argued the same point before the Bankruptcy Court in support of their position to avoid the lien.

In the Landen case, the Wyoming Supreme Court was called upon to determine whether a description of land in a Security Agreement sufficiently identified said land so as to satisfy the requirements of § 34-21-922(a)(i), § 34-

21-951(a) or § 34-21-910, Wyo. Stat. 1977, so that a security interest was created in the crops. The Security Agreement in Landen described the land as follows:

> "Various [s]ections, T25N and T26N, R76W, Albany County and various sections, T23N, T24N, T25N and T26N, R68W, Platte County, Wyoming."

The Security Agreement thus stated that the creditor was secured by an unknown number of sections in two counties in Wyoming. Because there were six townships listed, the creditor's interests lie somewhere among the 216 sections or within 216 square miles in two counties.

The Wyoming Supreme Court then quoted United States v. Collingwood Grain, Inc., 792 F.2d 972, (10th Cir. 1986) as to what might be deemed a sufficient real estate description in connection with crops:

> "[A] real estate description in connection with crops is sufficient if it contains:
>
> 1. the name of the land owner

2. the approximate number of acres of the farm
3. the county of the location of the land
4. the approximate distance and direction of the farm from the nearest town or city."

United States v. Collingwood Grain, Inc., 792 F.2d 972, 974-75 (10th Cir. 1986), quoting United States v. McMannis, 39 B.R. 98 (Bankr. D. Kan. 1983) (emphasis in original).

It has also been said that:

> "[T]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Id. at 975, quoting Kansas Comment to Kan. Stat. Ann. Section 84-9-402, which discusses Chanute Production Credit Association v. Weir Grain & Supply, Inc., 210 Kan. 181, 499 P.2d 517 (1972).

The court then held: "...that the description of property in the Landen case fell short of both of these tests. A vague reference to various sections within certain townships and ranges does not reasonably identify the land so as to

satisfy the requirements of § 34-21-922(a)(i), § 34-21-951(a), or § 34-21-910." Landen v. Production Credit Association of the Midlands, supra at 1329.

The Landen decision is distinguishable from the case at hand. First, in Landen the Security Agreement in question was not specific as to what property the creditor had an interest in. The Security Agreement in Landen only indicated that the creditor had an interest somewhere within a 216 square mile area within two counties. In this case, Stockmens Bank and Trust Company has perfected a security interest which specifically describes the properties by which it is secured. The six contiguous sections were all located in a single township and county, and all were specified by legal description. In this

case, Stockmens Bank and Trust Company had filed Financing Statements, executed by the Debtors, incorporated by reference into the Security Agreements, which specifically described the section, township, range and county in which the Bank is secured.

The fact that the description of the property on which the crops were growing or to be grown is overly broad should not, in itself, defeat the security interest of FDIC. The basic test of whether a real estate description is sufficient is stated in Wyo. Statutes 34-21-910 and Section 34-21-951.

The official UCC comment to 9-110 from which 34-21-910 is adopted states as follows:

> "The requirement of description of collateral (see § 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it

-- that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a Financing Statement. See Section 9-402."

The official UCC comment to 9-402, Comment 5, from which 34-21-951 is derived states as follows:

"A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real estate must be sufficient so that the fixture Financing Statement will fit into the real estate search system and the Financing Statement by found by a real estate searcher." (emphasis added)

In accord with the official UCC comments in the case United States v. Collingwood Grain, Inc., 792 F.2d 972 (10th Cir. 1986) which the Wyoming Supreme Court relied upon in Landen, supra.

In that 10th Circuit Court decision, the court was called upon to rule on whether a Financing Statement covering crops grown on 160 acres of leased land within a single 640 acre section was sufficient under the Kansas law, even though it did not specify which 160 tract within the 640 acre section was subject to the Security Agreement. The District Court found that the description of the land on which the secured creditor claimed a security interest in growing crops was insufficient to perfect a security interest. The secured creditor appealed.

Like Wyoming, in Kansas when growing crops are to be covered by a Security

Agreement, the agreement must include a "description of the real estate concerned." See Kan. Stat. Ann. Section 84-9-402(1), Section 84-9-203(1)(a)(1983), and Wyo. Stat. Section 34-21-951.

The Court of Appeals then noted that the District court in Kansas relied on In re McMannis, 39 B.R. 98 (Bankr. D.Kan. 1983). In McMannis, the Court stated as follows:

> "Most Courts have held that a Financing Statement real estate description in connection with crops is sufficient if it contains:
>
> 1. the name of the land owner
> 2. the approximate number of acres of the farm
> 3. the county of the location of the land
> 4. the approximate distance and direction of the farm from the nearest town or city." Id at 100.

The Court of Appeals, after reflecting on the list above, stated that the "list shows only the items that will guarantee sufficient description. It does

not present items that are always required. To hold that it does would ignore Kansas statute and commentary." United States v. Collingwood, supra at 975 (emphasis added). The Court of Appeals then went on to hold that:

> "The 160 acres are described as within a 640 acre section. It would not take an elaborate investigation to discover which land was covered. The Collingwood filing surely "provided clues sufficient that third parties by reasonable care and diligence [might] ascertain the property covered..." See Kan. Stat. Ann. Section 84-9-110 Kansas Comment at 409 (1983). United States v. Collingwood Grain, Inc., supra at 975.

The Court of Appeals decision would be consistent with the trend of the courts to construe the Uniform Commercial Code to be lenient in judging the sufficiency of descriptions in Financing Statements. See Tri State Equipment Co., Inc. v. Allis-Chalmers Credit Corp., 792 F.2d 967, 971, 972 (10th Cir. 1986); John Deere Co. v.

Butler County Implement, Inc., 232 Kan. 273, 655 P.2d 124, 30 (1982).

Thus in Collingwood, which the Wyoming Supreme Court relied upon in Landen, the Court of Appeals reversed the District Court of Kansas and held that the over-inclusion of property in a Financing Statement does not vitiate the perfection of a security interest.

As a general proposition, the issue decided by the Bankruptcy Court was not even presented to the Bankruptcy Court by either the Debtors or the FDIC. The Bankruptcy Court, on its own initiative, chose to decide the issue concerning the FDIC's lien by looking at the Security Agreement between the Debtors and the Bank. The parties were arguing before the Bankruptcy Court about the legal description contained in the Financing Statements. It is therefore quite

understandable why the Bankruptcy Court arrived at the decision it did, when it was not fully briefed or advised of the evidence to consider when looking at the Security Agreement. The legal conclusions drawn by the Bankruptcy Court are clearly based upon a misunderstanding of the record presented at the April 12, 1989, hearing, in that the record presented the Court was only aimed at the issue of legal description contained in the Financing Statements, not the validity or the existence of Security Agreement. The validity and existence of the Security Agreements between the Debtors and the Bank has never been disputed by the Debtors; only their perfection. The Bankruptcy Court does state the basic problem with its decision on Page 4 wherein the Court states that "both parties have submitted the Motion on the

issue of whether the real estate description in connection with crops contained in the Financing Statements is sufficient to perfect the security interest under the Wyoming Uniform Commercial Code." (emphasis in original). It is clear that the Bankruptcy Court was not fully advised as to the position of the parties concerning the Security Agreements nor was it looking correctly at the documents necessary to arrive at its decision. The Court did address the adequacy of the legal description in the Security Agreement by reference to the Landen case, supra. However, the Court failed to take into account the incorporation by reference of the legal description in the Financing Statements discussed above.

The Appellees, in their brief, state that the "issue raised by this appeal is

whether the FDIC had a valid security interest on the Appellees' crops after 1986" (emphasis added). This would imply that there was a valid perfected security interest on the crops in 1986 which became invalid after 1986. The actual issue on Appeal is whether or not there was a valid perfected security interest in any year, 1986 or otherwise.

The Appellees attached an Exhibit B to their Brief which they say shows the legal description of the property upon which the debtors' grow crops. Their argument is that the Exhibit B description is different from that of the FDIC's. However, a careful examination of the documents shows that all of the sections of property referenced in the FDIC's Security Agreements are, in fact, included in the legal description in Appellee's Exhibit B.

The Appellees' argument that 11 U.S.C. Section 552 eliminates the lien on the post-petition crops does not take into account the fact that the Debtor used the proceeds from the FDIC's pre-petition crops to create the post-petition property. Consequently, under 11 U.S.C. Section 552(b), the post petition crops are, for all intents and purposes, proceeds to which the FDIC security interest attaches.

The Appellees further state the "those crops or products thereof have been disposed of long ago by the bankruptcy estate" and argue that this allegation somehow makes this appeal a moot issue. While the Debtors' statement of proceeds' disposition is probably true, it does not negate the fact that the FDIC's security interest attaches to the crops and their sale proceeds and the FDIC, under the

U.C.C., still has a cause of action to recover the proceeds.

The Debtors argue to this Court that since they have sold all their crops and spent the money, there is no longer an issue to be determined. This is not the case. The issue (the existence of the security interest) is still a matter in controversy not only in this Appeal but also in a replevin action in the Wyoming State District Court in and for the County of Campbell, Sixth Judicial District, in a civil action entitled FDIC v. Coones et al. As was explained above, the crops and proceeds which the Debtors have disposed of are all subject to the security interest of the FDIC and can be recovered by the secured party.

As a matter of federal law, the order relied upon by the Debtors from the Bankruptcy Court below is not final for

all purposes. Section 1730(a)(1) of Title 12 of the United States Code provides in pertinent part that;

> "No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any state or of the United States or any territory, or any other court."

Similarly, 12 U.S.C. Section 91 states that "No attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county, or municipal court," in United States v. LeMaire, 826 F.2d 387 (5th Circ. 1987), cert. denied, 485 U.S. 960 (1988), the Court reviewed 12 U.S.C. Section 91 and determined that "final judgment" as used in Section 91 "means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and

conclusion of the appellate process, or because of the passage, without action, of the time preceding appellate review." LeMaire, 826 F.2d 390. Therefore, it follows that as a matter of federal law, the bankruptcy court's Order was not final as to the FDIC and, since the bankruptcy court's Order was not final, the security interest of the FDIC was not voided.

Appellees further argue that general contract principles are not applicable in this appeal. General contract principles are applicable to the Uniform Commercial Code. The fact of the matter is that the Uniform Commercial Code is an offspring of Contract Law; a codification of all commercial transactions up to and including the creation of the Uniform Commercial Code.

W.S.A. Section 34.1-1-1-102 states explicitly the purposes and policies

behind the Uniform Commercial Code. Not only is the Wyoming version of the Uniform Commercial Code to be "liberally construed and applied to promote its underlying purposes and policies", but the very purposes and policies of the Wyoming Code include the "expansion of commercial practices through custom usage and agreement of parties" (emphasis added) Id.

The Debtors rely on In re Mack, 93 B.R. 695 (Bankr.D.N.D. 1988) as a case "strikingly similar to the instant one". However, the Appellees fail to point out to this Court that the Mack case has a factual setting that is completely different than the one in this case. In the Mack case, there was an attempt by a secured creditor, who failed to include any property description or reference to the property in the security agreement, to claim a perfected security interest. The

creditor in Mack did describe the property in the Financing Statement and the court correctly found that this was insufficient to create a security interest. The facts in this case show that the description of the property upon which the crops were growing and were to be grown was included on the face of the Security Agreement by reference to a separate document: a practice that is standard in the agricultural industry when it concerns legal descriptions too large to fit on the face of the Security Agreement form. The Appellees state that the "reference to the county is necessary for a sufficient real estate description" citing United States v. Collingwood Grain Inc., 792 F.2d 972 (10th Circ. 1986). The Collingwood case does not require reference to the county. The Collingwood case stands for the proposition that reference to a county may

be one of the factors considered by the court in deciding insufficiency of the property description. The case does not demand that secured creditors accurately describe the property as would be argued by the Debtors.

THEREFORE, IT IS ORDERED that the ruling of the Bankruptcy Court below that the FDIC does not have a perfected security interest in the Debtors' crops be, and it hereby is, reversed.

DATED this 5th day of December, 1990.

s\Ewing T. Kerr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF WYOMING

In re	)	
	)	
JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones,	)	Case No. 88-05343-B
	)	Chapter 11
	)	
	)	
Debtors.	)	

D E C I S I O N

THIS MATTER comes before the court on the FDIC's Motion to Prohibit Use of Cash Collateral: Stephen R. Winship, Casper, Wyoming, appearing for the debtors; Jeanne R. Lee, Denver, Colorado, appearing for the FDIC as receiver for Stockmens Bank and Trust Company.

Now, the court having considered the Motion, the memoranda, having heard argument of counsel, and being fully advised, does hereby render its Decision.

The facts are not in dispute. On May 16, 1986, the debtors executed two notes, in the principal amounts of $400,000 and $70,000, to the Stockmens Bank. The notes were a combination promissory note and security agreement with the security agreement covering the bottom half of the document. The combined notes/security agreements contain the following description of collateral:

> All inventory of cattle, horses, and all other livestock, all farm products of cattle, horses, and all farm equipment and machinery, other equipment and machinery, inventory, farm products, hay, grain, crops, crop inventory and crop farm products, vehicles, accounts, contact rights or general intangibles arising from the sale or disposition of products thereof, now owned or hereafter acquired and wherever located.

At the bottom right hand side of the combination Promissory Note/Security Agreement is a space labeled, "Description of Real Estate if above Collateral is crops, growing or to be grown, timber,

minerals (including oil or gas) or fixtures." This is followed by the typed description "RECORDED ON FINANCING STATEMENT DATED MAY 16, 1986."

In addition to the combination note/ security agreement, on May 16, 1986 the debtors also executed separate security agreements to secure the $70,000 and $400,000 debts. The two (2) security agreements are basically identical. Both refer to Exhibits A and B which are attached to the security agreements. Exhibit B contains the identical description of collateral set forth above in the indented quote, together with the addition of certain specified livestock and the statement "all located 38 miles N.W. of Gillette on Spotted Horse Creek."

The Bank filed financing statements with the County Clerk, Campbell County,

Wyoming, and the Wyoming Secretary of State.

The financing statements filed on May 19, 1986 with the Campbell County Clerk, and May 29, 1986 with the Secretary of State, State of Wyoming, all contained the following language:

> All farm products of cattle, horses, farm products, hay, grain, crops, crop inventory and crop farm products, contract rights, assignment of federal crop insurance, & assignment of Commodity Credit Corporation proceeds, arising from the sale or disposition of products thereof, now owned or hereafter acquired and wherever located.
>
> Legal Description
> Section 28, Township 56, Range 75
> Section 27, Township 56, Range 75
> Section 33, Township 56, Range 75
> Section 34, Township 56, Range 75
> Section 35, Township 56, Range 75
> Section 26, Township 56, Range 75

The FDIC asserts that the debtors' crops are covered by its properly perfected security interest and, therefore, the proceeds are "cash

collateral" that cannot be used without either its permission or an order of this court.

The debtors, on the other hand, argue that the FDIC's interest is not properly perfected and, therefore, the proceeds of their crops are not cash collateral within the meaning of 11 U.S.C. § 363.

Both parties have submitted the Motion on the issue of whether the real estate description in connection with crops contained in the financing statements is sufficient to perfect the security interest under the Wyoming Uniform Commercial Code.

However, there is a more basic problem with the FDIC's claim of a perfected security interest in the crops and proceeds thereof. There is no adequate real estate description in

connection with crops contained in the security agreements.

The Wyoming Uniform Commercial Code provides:

> [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> (i) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; . . .

§ 34-21-922(a)(i), W.S. 1977 (1988 Cumm. Supp.) (emphasis added).

> For the purposes of this article, any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

§ 34-21-910, W.S. 1977.

To meet the requirements of sections 34-21-910 and 34-21-922(a)(i), a "real

estate description in connection with crops is sufficient if it contains:

1. the name of the land owner
2. the approximate number of acres of the farm
3. the county of the location of the land
4. the approximate distance and direction of the farm from the nearest town or city."

Landen v. Production Credit Association, 737 P.2d 1325, 1329 (Wyo. 1987), quoting United States v. Collingwood Grain, Inc., 792 F.2d 972, 974-75 10th Cir. 1986).

A creditor may also use a section-township legal description, "so long as it is accurate." Id.

In this case, the security agreements, which are the documents which create the security interests, do not contain an adequate description of the

land covered in connection with crops as required by § 34-21-922.

There is no township-range description in the security agreements. The descriptions of the real estate that are contained do not identify the owner of the land, do not specify the number of acres, or the county of location.

The descriptions in Exhibit B to the combined note/security agreement do specify the approximate distance and direction from a nearby town. However, by itself, that is not sufficient to identify the real estate.

It simply is not possible to identify the subject real estate upon which the crops will be grown by reference to the security agreements. Therefore, they fail to meet the requirements of § 34-21-922.

The fact that the real estate is more specifically described in the financing

statements does not alter this result. It is the security agreement that creates the security interest. A properly filed financing statement can only perfect, not create, a valid security interest.

> Although [UCC § 9-110 (§ 34-21-910, W.S. 1979)] sets forth the test for sufficiency of the description of collateral in both the security agreement and the financing statement, a description of collateral sufficient for a financing statement might not be sufficient in a security agreement. This is because the financing statement and the security agreement serve different purposes.
>
> The purpose of the financing statement is merely to provide notice of a possible security interest in the collateral in question. The description of collateral in a financing statement is sufficient if it reasonably informs third parties that an item in the possession of the debtor may be subject to a prior security interest, thus putting the parties on notice that further inquiry may be necessary.
>
> The security agreement is the contract between the parties; it specifies what the security interest is. Because of its different function, greater particularity in the description of collateral is

> required in the security agreement than in the financing statement. . . . [t]he description of collateral contained in the security agreement controls over that contained in the financing statements.

Landen v. Production Credit Association, supra, at 1325, quoting American Restaurant Supply Company v. Wilson, Fla. App., 371 So.2d 489, 490 (1979) (emphasis in original).

In motions regarding the use of cash collateral, a creditor must show that the cash involved is cash collateral within the meaning of § 363(a). This burden can be met by presenting documentation establishing a prima facie valid and perfected security interest in the collateral and its proceeds.

In this case, the movant has failed to establish that the proceeds of the crops are proceeds "of property subject to a security interest" within the meaning of § 363(a). Accordingly, its Motion to Prohibit Use of Cash Collateral will be

denied insofar as it referred to proceeds of the debtors' crops.

DATED this 23 day of June, 1989.

BY THE COURT

s\Harold L. Mai
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

In re:	)	Chapter 11
	)	
JAMES ALBERT COONES	)	Case No. 88-05343-B
and CINDY LEE COONES,	)	
	)	
Debtors.	)	

ORDER ON FDIC'S MOTION TO PROHIBIT USE OF CASH COLLATERAL

THIS MATTER comes before the Court upon the Motion of the Federal Deposit Insurance Corporation as Receiver of Stockmens Bank and Trust Company and First National Bank of Sheridan ("FDIC") to prohibit the use of cash collateral. After hearing the statements by counsel for the FDIC and Debtors, the Court makes the following findings:

1. Pursuant to 11 U.S.C. Section 363, the Debtors should have segregated any and all cash collateral in his possession, custody, and control on petition date.

2. Pursuant to 11 U.S.C. Section 363, the Debtors should not have used any cash collateral without the consent of the FDIC or pursuant to an order of the Court.

In light of the above, the Court HEREBY ORDERS THE FOLLOWING:

1. The Debtors shall forthwith segregate the cash collateral of the FDIC if they have not already done so.

2. The Debtors shall forthwith prepare an accounting of the use of cash collateral since the petition date for review by the FDIC.

3. The FDIC shall have the right to inspect the Debtors' records to insure compliance with 11 U.S.C. Section 363.

4. Pursuant to 11 U.S.C. Section 363, the Debtors shall not use said cash collateral without a court order allowing them to do so or unless the FDIC has expressly consented.

DATED this 16th day of May, 1989.

BY THE COURT:

s\Harold L. Mai
United States Bankruptcy Judge

APPROVED AS TO FORM:

By: _____
Stephen R. Winship, Esq.
Attorney for the Debtors

By: s\Jeanne R. Lee
Jeanne R. Lee, Esq.
Attorney for the FDIC

Supreme Court, U.S.
FILED
NOV 30 1993
OFFICE OF THE CLERK

No. 93-450

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES ALBERT COONES, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that under 11 U.S.C. 552 the Federal Deposit Insurance Corporation (FDIC) had a security interest in property acquired after the filing of a bankruptcy petition because that property was produced with the proceeds of pre-petition property in which the FDIC had a security interest.

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In the Supreme Court of the United States

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JAMES ALBERT COONES, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-7a, 8a-28a) are reported at 996 F.2d 250 and 954 F.2d 596. The opinion of the district court (Pet. App. 29a-67a) is unreported. The opinions of the bankruptcy court (Pet. App. 68a-78a, 79a-80a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1993. The petition for a writ of certiorari was filed on September 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Wyoming cattleman and farmer, and his wife (the debtors) jointly obtained two loans in 1986 totaling approximately $470,000 from Stockmen's Bank & Trust Company. Pet App. 31a. In connection with those loans, they executed two promissory notes and two security agreements. The security agreements gave Stockmen's a secured interest in:

> All farm products of the [debtors], whether now owned or hereafter acquired including but not limited to (i) all poultry and livestock and their young, products thereof and produce thereof, (ii) all crops, whether annual or perennial, and the products thereof * * * [and]:
>
> All inventory of cattle, horses, and all other livestock, all farm products of cattle, horses, and all farm equipment and machinery, * * * farm products, * * * crops, crop inventory and crop farm products * * * now owned or hereafter acquired.

Id. at 10a-11a.

On October 20, 1988, the debtors filed a petition in the United States Bankruptcy Court for the District of Wyoming, seeking relief under Chapter 11 of the Bankruptcy Code. At the time they filed their petition, the debtors did not submit all of the schedules and statements required under Bankruptcy Rule 1007, nor did they ask for an extension of time to file them.[1] In particular, the debtors did not file a

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[1] Bankruptcy Rule 1007(b)(1) requires the debtor in a Chapter 11 case to file schedules of assets and liabilities, a schedule of current income and expenditures, a statement of

completed schedule of exemptions until November 16, 1988, 27 days after the petition was filed.[2]

In the schedule of exemptions they ultimately filed, the debtors listed as exempt property 75 percent of the livestock they acquired after 1986 and 75 percent of the crops grown after 1986. They asserted that this property was exempt as personal service earnings under Wyoming law. Pet. App. 11a-12a. No timely objection to this exemption claim was filed by the Federal Deposit Insurance Corporation (FDIC) or any other interested party. See 11 U.S.C. 522(*l*); Bankr. R. 4003(b).

2. The FDIC was appointed receiver of Stockmen's in 1987. In that capacity, the FDIC was the holder of the notes and security agreements that the debtors had executed in favor of Stockmen's in 1986. Pet App. 31a. In February, 1989, the debtors applied to the bankruptcy court to avoid the FDIC's liens on the crops and livestock as to which they had claimed an exemption. See 11 U.S.C. 522(f). Also in February, 1989, the FDIC filed a motion to prohibit the debtors' use of cash collateral. See Pet. App. 12a; 11 U.S.C. 363(e).

The bankruptcy court denied the debtors' claimed exemptions, despite the lack of a timely objection by the FDIC, holding that the exemptions had no basis in

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financial affairs, and a statement of executory contracts. Under Rule 1007(c), these schedules and statements must "be filed with the petition * * *, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter."

[2] Under Bankruptcy Rule 4003(a), "[a] debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007."

state law. Pet. App. 12a. The court also denied the FDIC's motion to prohibit use of cash collateral with respect to the FDIC's interest in the debtors' crops, holding that the FDIC did not have an enforceable security interest in that property. *Id.* at 12a-13a, 68a-78a.

3. On cross-appeals, the district court certified to the Wyoming Supreme Court the question whether state law permitted the debtors to exempt livestock acquired and crops grown after 1986 as "personal service earnings." Pet. App. 13a. The Wyoming Supreme Court declared that the exemptions were not valid as personal service earnings under state law. *Coones* v. *FDIC*, 796 P.2d 803, 804, 806 (Wyo. 1990). Based on the Wyoming Supreme Court's decision, the district court held that the debtors were not entitled to the exemptions, despite the FDIC's failure to file a timely objection to their exemption claims. Pet. App. 13a-14a.

In a separate order, the district court held that the FDIC had a perfected security interest in the debtors' post-petition crops. Pet. App. 29a-67a. The court rejected the debtors' argument that 11 U.S.C. 552(a) extinguished the FDIC's lien on the post-petition crops. The court determined that, because "the [debtors] used the proceeds from the FDIC's pre-petition crops to create the post-petition property," the post-petition property constituted "proceeds" in which the FDIC retained a secured interest pursuant to 11 U.S.C. 552(b). Pet. App. 61a.[3]

---

[3] Section 552 (11 U.S.C.) provides:

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the

4. The court of appeals affirmed. Pet. App. 8a-28a.[4] It held that the FDIC's failure to object to the debtors' exemption claim did not "preclude the bankruptcy court's exercise of its authority to deny an exemption that ha[d] no legal basis." *Id.* at 15a. It also held that the FDIC had a perfected security interest in the debtors' post-petition crops under 11 U.S.C. 552(b). Pet. App. 17a-25a.

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commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

[4] While the cross-appeals were pending in the district court, the bankruptcy court denied confirmation of the debtors' proposed Chapter 11 plan. Subsequently, the bankruptcy court denied the debtors' motion to convert to a Chapter 12 proceeding. On March 29, 1990, the bankruptcy court granted the creditors' motion to dismiss the Chapter 11 proceeding, but gave the debtors ten days to elect to convert to a case under Chapter 7. Petitioner's wife converted to a Chapter 7 case, but petitioner did not. Instead, he appealed the order dismissing the case. That appeal is pending.

5. The debtors sought review of both holdings by filing a petition for a writ of certiorari in this Court. In light of this Court's intervening decision in *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644 (1992), the FDIC agreed with petitioners that the court of appeals had erred in holding that the FDIC was entitled to object to their exemption claim, despite the FDIC's failure to file a timely objection to that claim. The FDIC accordingly suggested that, with respect to that issue, this Court grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of *Freeland & Kronz*. The Court did so. 113 S. Ct. 31 (1992). The Court subsequently denied petitioner's motion for clarification of the remand order. 113 S. Ct. 402 (1992).

6. On remand, the court of appeals reversed itself on the issue as to which the FDIC had acquiesced in the granting of the petition for certiorari, holding, in light of *Freeland & Kronz*, that the FDIC's failure to file a timely objection barred it from objecting to petitioner's exemption claim. The court adhered, however, to its prior holding that the FDIC had a security interest in post-petition crops produced with the proceeds of pre-petition property in which the FDIC had held a security interest. Pet. App. 3a, 7a.

ARGUMENT

Petitioner challenges the court of appeals' holding that under 11 U.S.C. 552(b) the FDIC had a perfected security interest in crops acquired after the petition for bankruptcy was filed. Pet. 11-17. That contention does not warrant further review.

Section 552 of the Bankruptcy Code addresses the effect of pre-petition security agreements on property acquired after the petition has been filed. Section 552(a) provides that "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. 552(a). Section 552(b), in turn, provides that, with exceptions not pertinent here:

> [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds * * * of such property, then such security interest extends to such proceeds * * * to the extent provided by such security agreement and by applicable non-bankruptcy law.

11 U.S.C. 552(b). Thus, under Section 552 an entity's security interest in pre-petition property extends to post-petition property that constitutes "proceeds" of the pre-petition property, if the security agreement between the entity and the debtor so provides.

It is undisputed in this case that the security agreements between the debtors and Stockmen's, to which the FDIC succeeded, provided for a security interest in the proceeds of the debtors' crops. Furthermore, the district court found that petitioner and his wife "used the proceeds from the FDIC's pre-petition crops to create the post-petition property" in

which the FDIC claimed an interest. Pet. App. 61a. The court of appeals accepted that finding, observing that petitioner did not identify any evidence to contravene it. *Id.* at 26a-28a; see also *id.* at 9a-10a (applying a "clearly erroneous" standard of review to findings of fact). The court of appeals held that "because the post-petition crops were produced with the proceeds of debtors' pre-petition crops, proceeds in which the FDIC's security interest continued after initiation of bankruptcy proceedings, § 552 did not extinguish the FDIC's secured interest in the post-petition crops." *Id.* at 26a-27a.

The court of appeals' holding reflects a straightforward reading of Section 552(b). Under that reading, Section 552(b) applies when a security agreement covering pre-petition property creates a security interest in both the property and "proceeds" of that property. In that situation, Section 552(b) provides that the holder of the security interest retains an interest in such proceeds, even if those proceeds are acquired after commencement of the bankruptcy case. Having determined that the debtors' post-petition crops were created with the proceeds of pre-petition crops in which the FDIC had a security interest, the court of appeals correctly concluded that the FDIC retained an interest in the post-petition crops under Section 552(b).

Contrary to petitioner's suggestion, the court of appeals' conclusion does not conflict with the decision of any other court of appeals.[5] Moreover, the decision

[5] Petitioner contends (Pet. 15) that the decision of the court of appeals in this case "appears to conflict with the rationale underlying" *In re Bering Trader, Inc.*, 944 F.2d 500 (9th Cir. 1991), and *In re Jones*, 908 F.2d 859 (11th Cir. 1990). In those

of the court of appeals accords with decisions in other circuits involving similar facts. See *In re Bumper Sales, Inc.*, 907 F.2d 1430, 1439 (4th Cir. 1990); *J. Catton Farms, Inc.* v. *First Nat'l Bank*, 779 F.2d 1242, 1244, 1246-1247 (7th Cir. 1985); see also B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* ¶ 6.04[1], at 6-55 (2d ed. 1988) ("[T]he term 'proceeds' should be read broadly—as in UCC § 9-306—to include after-acquired property, at least where inventory and accounts are concerned, there is no improvement in position, and tracing can be accomplished. This is nothing more than a post-petition substitution of collateral."). Further review is therefore not warranted.

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cases, however, the courts of appeals merely held—on facts quite different from those of this case—that the post-petition property at issue did not constitute "proceeds" of pre-petition property in which the creditor held a security interest. See *In re Bering Trader*, 944 F.2d at 501-502 (post-petition rent payments on a charter vessel were not "proceeds"); *In re Jones*, 908 F.2d at 860-861 (post-petition increase in cash surrender value of life insurance policy was not "proceeds"). These fact-specific holdings are inapposite here. For the same reason, the district court and bankruptcy court decisions upon which petitioner relies (Pet. 15) are also inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1993